Neutral Citation Number: [2016] EWCA Crim 889

Case No: 2015/00058/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
His Honour Judge Grieve QC
T.20097454

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2016

Before :

LADY JUSTICE MACUR
MR JUSTICE FLAUX
and
RECORDER OF LIVERPOOL
(His Honour Judge Goldstone QC)
(Sitting as Judge of the Court of Appeal Criminal Division)

Between :

Regina	**Respondent**
- and -	
Patrick Neale Orr	**Appellant**

John Black QC and David Durose appeared for the **Crown**
David Spens QC for the **Defence**

Hearing dates : 21 June 2016

Approved Judgment

Lady Justice Macur:

1. The appeal concerns the definition of 'fitness to plead' and the process engaged by the trial judge in the instant trial which proceeded after he found the defendant 'unfit to be cross examined'.

2. The appellant is a solicitor. On 27/11/2014 he was convicted of being concerned in a money laundering arrangement. On 6th February 2015 he was sentenced to 2 years imprisonment suspended for 12 months.

3. The facts of the offence need scant reference in view of the issue engaged. The previous litigation history has greater relevance.

4. The appellants co-accused Scheffer and Bakker, were Dutch nationals who worked with the United Nations Development Program (UNDP). In 2004/5 a multi-dollar contract for the supply and distribution of medical aid in the Democratic Republic of Congo (DRC), was to be put out for tender. Scheffer and Bakker negotiated an agreement with a Danish pharmaceuticals company, Missionpharma that in return for assistance in securing a contract the co-accused would receive a percentage of payments made under the contract. Missionpharma was successful in its bid and that company paid the accused 5 per cent of their contractual payments through a company set up specifically for this purpose HC Consultants Limited. Throughout 2006 to 2007 $1.2 million was paid accordingly, which the prosecution asserted were corrupt payments. The appellant, a solicitor in private practice, acted for Scheffer and Bakker. He drafted the agreements, set up HC Consultants (HCC) and became the sole director and signatory on HCC's bank accounts. Over the course of 2006/7, the appellant dealt with the payments from Missionpharma through HCC's bank accounts on instructions from his co-accused.

5. The appellant was arrested and interviewed. He gave a prepared statement in his first interview. In the second interview, he answered questions fully and put forward his defence. The appellant said that he neither knew nor suspected that these funds were the proceeds of corruption or crime; and that he acted perfectly properly in his professional capacity at all relevant times.

6. The prosecution case was that the appellant was knowingly engaged in laundering the corrupt monies on behalf of his co-accused and that the appellant knew of the corrupt relationship between the co-accused and Missionpharma prior to 27th May 2007; the HCC company had been set up specifically to receive and channel the corrupt payments from Missionpharma; his executive and sole control of the funds evidenced the relationship between the co-accused and the appellant.

7. The prosecution relied almost entirely on written statements and documentation, including email correspondence to indicate knowledge of the appellant.

8. The defence case was that the appellant had not known of the corrupt relationship and at no time had known or suspected that he was dealing with the proceeds of corruption. Rather, he had acted perfectly properly in his professional capacity at all

relevant times and had understood that HCC had been set up as a means to minimise tax liabilities of legitimate funds.

9. The documents relied upon by the prosecution could equally show that the relationship was of solicitor and client and revealed no knowledge of the offending. The appellant did not always follow instructions of his clients. He was of positive good character, an honest man who worked hard and for long hours; albeit that he was a little disorganised. He had been duped by the co-accused.

10. On 10th August 2011, in Denmark, Missionpharma accepted that the company was guilty of an offence of bribery in connection with their contract. On 14 September 2012, Bakker pleaded guilty to an offence of receiving corrupt payments. Scheffer was convicted following a retrial.

11. We have transcripts of the proceedings in which the trial process was debated on the 14, 18 and 19 November 2014, but have been additionally assisted as to the surrounding circumstances by trial counsel who (save for the absence of junior counsel for the defendant) all appear as counsel in the appeal. The appellant is represented by Mr Spens QC. The respondent is represented by Mr Black QC and Mr Durose.

12. The first trial of the appellant and Scheffer had commenced in October of 2012. It was terminated when the appellant became 'unfit' shortly after his cross-examination by the prosecution had begun. The trial was re fixed in June 2013 but proceeded for Scheffer only due to the continuing ill health of the appellant. This trial was halted for reasons irrelevant to this appeal.

13. The trial of the appellant commenced on 27th October 2014. He elected to give evidence and gave his evidence in chief from Friday 7th to Tuesday 11th November 2014. On Wednesday 12th November the prosecution were due to cross examine the appellant. The appellant was unwell and the judge adjourned the trial to allow the appellant to be examined by Dr Taylor, a psychiatrist.

14. On Friday 14th November 2014 Dr Taylor and a colleague Dr Shweikh attended court and assessed the appellant to be unfit to be cross-examined. Dr Taylor, instructed by the defence, had prepared a "Fifth/Addendum Psychiatric report" dated 3 November 2014. Dr Taylor gave short oral evidence in the absence of the jury. He gave his opinion that, having examined the appellant that day and utilising the principles relevant in determining capacity to make a decision in accordance with the Mental Capacity Act 2005, the appellant was unable to participate in his trial. In short, the appellant was unable to be responsive to cross examination, and that that position was unlikely to ameliorate in the future.

15. The judge was informed of Dr Shweikh's attendance and that her consequent report was to/ may be utilised in any prospective 'fitness to plead' procedure. Thereafter, however, Mr Spens QC indicated that the appellant wished the trial to continue and that he [Mr Spens QC] would not be "implacably opposed" to the trial continuing if the prosecution were denied the opportunity to make a closing speech. Referring the judge to the "alternative…if you are satisfied that he is unfit" he said "but a finding of fact against [the appellant] if that is what the jury concluded, is, although not a conviction, something that he would find extremely hard to bear, because it is a form

of stigma, whatever the law says about it." Mr Spens QC implicitly invited the judge to publicly express a view to dissuade the prosecution from continuing with the prosecution in the circumstances. The judge gave his "provisional view" that the "best solution" was to proceed with the trial but to place "quite strict limits" on the prosecution closing speech. Later that day, in the absence of Mr Spens QC, Mr Sims, junior trial counsel for the appellant, thereupon indicated an intention to apply for the discharge of the jury dependent upon the draft prosecution closing speech and the second psychiatric report.

16. Dr Shweikh, instructed by the prosecution, subsequently produced a report dated 17 November 2014. In her report she indicated that "[the appellant] is unable to give evidence in his own defence…due to the nature of his mental state…that renders him currently **unfit to plead.**" On Tuesday 18th November 2014, Mr Simms, again in the absence of Mr Spens QC, submitted that the appellant was not fit to plead and the prosecution "in the circumstances should not be permitted to give a closing speech." The judge referred to the report of Dr Shweikh and what he considered to be "a very firm, unequivocal view that [the appellant] was not fit to give oral evidence…" After further discussion he inquired of Mr Sims, "So that I am entirely clear…your current submission is that, on the evidence before the court, [the appellant] is not fit any longer to stand trial, in the sense that it has reached the point where he is no longer fit to take part and…to consider whether …to convert to a process of determining whether or not he did the act." Mr Sims, having sought instructions whilst on his feet, responded that the first submission was that the prosecution should not make a speech although "I am hampered by the fact that I believe the interpretation of the report is that [the appellant] is unfit."

17. Mr Black QC informed the judge that Mr Spens QC had indicated "his preference for proceeding under the 1964 Act route", however submitted that "we do believe that if the defence want to proceed with the trial, there can be a fair trial. If the court is of the view at the moment that this defendant is unfit to be tried, then we submit that the procedure has to take place." The judge posed to him the question of whether, in the light of the evidence of two qualified psychiatrists that the defendant was no longer fit to be tried, "…and if I take the view – and it would be very difficult to see how I wouldn't …can we continue to have a trial…". He went on to postulate "The options seem to be: firstly, is the Crown prepared to forgo its closing speech …with the consequence that this trial continues as a trial in the full sense of the word…or does the Crown say that if the court were to refuse the opportunity to make a closing speech, the appropriate course would be to convert to a trial under the 1964 Act." After due reflection Mr Black QC advised the judge that "it seems to us…the defence have now raised the issue of fitness to plead. Therefore the procedure … set out …in section 4A of the 1968 Act must then be followed." However, Mr Black QC, referring to the fact that the appellant had already given evidence in chief, indicated that, in deciding the issue of fitness to be tried it was for the judge to assess whether the appellant had <u>been</u> unfit to give evidence, and not merely his inability to give evidence under cross examination. Thereafter the judge indicated his 'present view' that the appellant was unfit to be cross examined, but specifically that he had been fit to have given the evidence he already had. He likened the appellant to a vulnerable witness who had difficulty in dealing with part of the trial process and should not be "in any way disadvantaged by not having the opportunity, or by the fact that he is not going to be cross examined" and did not see why the prosecution should not be able

make a closing speech, albeit curtailed in view of, what he found to be, the appellant's involuntary incapacity.

18. On Wednesday 19th, counsel for the appellant again applied for the jury to be discharged from returning a verdict but this was refused. Leading counsel for the prosecution disclosed a draft of his closing speech prepared in accordance with the trial judge's direction that it should not contain reference to any subject which the appellant had not been in a position to meet in cross examination, and further edited it at the request of the defence prior to delivery. The judge directed the jury during his summing up on the issue as follows:

> "As you know, Mr Orr has suffered from ill health, specifically depression for a number of years, which as you probably know can be and very often is extremely debilitating and very unpleasant. This fact has had an impact on these proceedings at various stages. In this trial attempts have been made to minimise the difficulties it was likely to cause [the appellant] in the trial process, such as taking more frequent breaks and allowing him to sit with his legal advisers. When the time came, he chose to give evidence on his own behalf and did so for many hours, spread over three court days. The morning after he had finished his evidence in chief…he was clearly not in a fit condition to continue. That remained the position over the course of the following days, during which he was examined by two experienced consultant forensic psychiatrists…They have each independently formed the same firm opinion, namely that [the appellant] was not fit to continue giving evidence, and most particularly not fit to undergo cross examination. They are both equally of the firm opinion that his condition is entirely genuine and lies outside his control. No one suggests otherwise. In view of their opinions, it seemed to me there was no prospect that this position would change within a manageable time in the context of this trial. I therefore decided that he could not continue with his evidence and that the trial should move on to its next stages…It follows from what I have said, and you must accept it from me, that [the appellant's] inability to continue giving evidence is in no way his fault. He told me, and I do not doubt it, that he would like to carry on giving evidence and to have the opportunity of answering questions put in cross examination…It means that you only have his evidence in chief to consider and that the prosecution has not had the opportunity to test his evidence in cross examination. But that is just a consequence of the unusual circumstances of this case. What you must not do is speculate about the answers he may have given had he been cross examined…"

19. The appellant was convicted as indicated above. The grounds of appeal may be reduced to the following:

i) If the trial judge found the appellant was unable to be cross-examined by virtue of his inability to properly respond to questions asked in cross-examination, he should have ruled that he was not fit to be tried, discharged the jury from returning verdicts and then, proceeded to a determination by the jury as to whether the appellant had done the act or made the omission charged against him in accordance with section 4A(1) of the Criminal Procedure (Insanity)Act 1964 ;

ii) In the alternative the appellant's conviction is unsafe since he did not receive a fair trial.

The respondent opposes the appeal on the grounds that

i) The trial judge was entitled on the law and the facts to rule that, whilst the appellant was unfit to be cross-examined, he was not unfit to be tried.

ii) In the circumstances, and particularly given the restrictions placed upon the prosecution closing speech and the careful direction to the jury during the summing up, the appellant had a fair trial. The conviction was not unsafe.

20. It is usually assumed that a defendant, whether or not guilty of the alleged wrong doing, will welcome the opportunity not to be cross examined. The process is necessarily challenging. We do not attempt to speculate what would be the position in this case if the appellant had been deemed fit to proceed with cross examination. A defendant's refusal/unwillingness to give evidence, including answering questions reasonably asked of him, is subject to possible adverse direction to the jury (see below). That is not to say that the process of cross examination will necessarily damage a defendant's case nor undermine his position; it may enhance it in the jury's eyes.

21. On the other hand, failure to cross examine is usually deemed an acceptance of a witness's testimony, save where the judge has given leave not to cross examine, or managed or restricted the cross examination, on the basis of vulnerability, repetition, or incredulity. However, in all such cases the witness will have been 'available' to cross examine and the advocate at liberty to attack the evidence in submissions to judge or jury. It is understandable in these circumstances that the respondent points to the advantage afforded to the appellant in this case, and the corresponding detriment to the prosecution, by reason on the judge's prohibition upon cross examination and restrictions placed upon the prosecution closing speech, albeit accepted at the time without demur with a view to finalising the case.

22. In all the circumstances, the appellant having given his evidence in chief over the course of several days, dealing in detail with the prosecution case as opened and formulated again during a submission of no case to answer, and having regard to the judge's direction to the jury as set out above, we have no doubt that there is a strong argument that the appellant, if otherwise fit to participate in his trial, was not disadvantaged, and in other circumstances we would no doubt be persuaded that there was ample sufficiency of evidence to justify the jury verdict and to find that the conviction was not unsafe.

23. However, we have come to the certain conclusion that the issue of fitness to plead, so called in the Criminal Procedure (Insanity) Act 1964, section 4, but we think more aptly to be identified as 'fitness to participate in the trial process', since "the supposed disability" can be determined at any stage up to "verdict of acquittal", cannot be determined by reference to part only of the trial process. The capacity to be cross examined is part and parcel of the defendant's ability to give evidence in his own defence.

24. The nature and extent of a defendant's mental incapacity will obviously be fact specific. Section 35 (1) (a) of the Criminal Justice and Public Order Act 1994 caters for the situation when "the physical or mental condition of the accused makes it undesirable for him to give evidence" whether in terms of persuading the trial judge not to give the usual warning of, or negating the possible adverse inference to be drawn by his failure to do so, or answer questions without good cause. This statutory provision would support the respondent's contention that a finding that the appellant was unfit to give evidence in cross examination does not necessarily determine the question of 'fitness to plead'.

25. The case of *Pritchard (1836) 7* identified three factors for the jury to consider in determining the defendant's ability to participate in his trial. At that time, of course, a defendant could not give evidence in his own defence. The test was subsequently endorsed and approved by the Court of Appeal on several occasions. In *R v John M [2003] EWCA Crim 3452,* the trial judge had directed the jury (then in charge of determining fitness to plead) with an extended formulation of the test, including the appellant's ability to give evidence, if he wished, in his own defence. This facility had been described to mean that "the defendant must be able (a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give. It is not necessary that his answers should be plausible or believable or reliable…Nor is it necessary that the defendant should be able to remember all or any of the matters which give rise to the charge against him…" [24]. The Court of Appeal referred to them as "admirable directions". The Court of Appeal in *R v Walls [2011] EWCA Crim 443* referred to them "careful directions…elucidating the test in a case where the issue was determined by the jury". The recent Law Commission Report (Law Comm No 364) on 'Unfitness to Plead' dated January 2016, favours a statutory formulation of the test to encompass the abilities identified in John M, informed by the corresponding observations in *SC v United Kingdom 920050 40 EHRR 10.*

26. The prosecution did not take issue at trial with the expert opinion that the appellant was unfit to be cross examined and did not do so before us. It is right to observe that these were highly unusual factual circumstances and may have merited a more detailed exploration of the two psychiatrists' reasons and conclusions, not least in terms of possible means of facilitating the appellant being cross examined in the presence of an intermediary. In any event, we regret that the 'provisional' and 'present' views expressed and revealed in the transcript of proceedings, and subsequent ruling by the trial judge on the renewed application to discharge the jury from returning a verdict, do not articulate a 'rigorous examination and a careful analysis against the Pritchard criteria as interpreted in Podola." (See *Walls [38])*

27. The trial judge was referred to *Pritchard, John M and Wall* but his attention was not specifically drawn to section 35. He would not have been assisted in that he was

presented with something of a moving feast in terms of the different, and sometimes mutually inconsistent, submissions made by the appellant's trial counsel as to whether and by what means the trial should proceed, nor the failure of the prosecution submissions to address the nature and extent of the disability or invite him to make specific findings on the same. The judge's ruling is ambiguous; however, it appears that his finding that the appellant's "particular difficulty was he was not fit to undergo cross examination, but that did not mean that he was not fit to – that the other, up until that point (underlining supplied) the Pritchard criteria were met", must implicitly mean that he found that thereafter they were not.

28. In the absence of more detailed cross examination of the psychiatric opinions, we are unable to conduct the exercise retrospectively in order to form an assessment as to whether the extent of the appellant's disability did indicate an absolute impediment to him giving evidence in cross examination and thereby rendering him 'unfit to plead' rather than making it 'undesirable for him to give evidence' which appears to be at the heart of the respective contentions of appellant and respondent. In light of the trial judge's implicit finding indicated above, and the substance of his direction in this regard to the jury, we must assume that he considered the mental health of the appellant an absolute bar to him being allowed to be cross examined.

29. Once the issue of fitness to plead has been raised it must be determined. In this case, the judge explicitly found that the appellant had been fit to participate in his trial up to the point of cross examination and thereby implicitly determined that the appellant was no longer able to fully participate in his trial within the 'Pritchard' refined criteria. In these circumstances, the procedure to be adopted was clearly set out by section Criminal Procedure (Insanity) Act 1964, 4A.

30. We agree with the submission that this is a statutory mandatory requirement which cannot be avoided by the court's general discretion to order proceedings otherwise, however beneficial to the defendant they may appear. It follows that, in this case, the jury should not have been allowed to return a verdict, other than a verdict of acquittal if they were not satisfied on the evidence already given in the trial that the appellant did the act charged against him.

31. The appeal against conviction must be allowed.